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MEMORANDUM

TO: Committee on Legal Services

FROM: Thomas Morris, Office of Legislative Legal Services

DATE: January 29, 2019

SUBJECT: Rules of the Director of the Division of Oil and Public Safety, Department of Labor and Employment, concerning explosives regulations, 7 CCR 1101-9 (LLS Docket No. 180442; SOS Tracking No. 2018-00443).¹

Summary of Problems Identified and Recommendations

Section 24-4-103 (12.5)(a)(IV), C.R.S., allows a rule to incorporate a code by reference if the rule states where copies of the code are available from the organization originally issuing the code. But Rule 1-5 of the Director of the Division of Oil and Public Safety (Director) does not include the statement required by statute. **Because Rule 1-5 conflicts with the statute, we recommend that Rule 1-5 of the rules of the Director concerning explosives regulations not be extended.**

Section 24-4-103 (12.5)(a)(II), C.R.S., does not allow a rule to incorporate a local rule by reference, and allows the incorporation of federal rules only if the reference to the federal rules fully complies with the incorporation by reference statute. But the Director's Rule 6-1 (G) attempts to incorporate local rules and does not comply with any of the incorporation by reference requirements. **Because Rule 6-1 (G) conflicts**

¹ Under § 24-4-103, C.R.S., the Office of Legislative Legal Services reviews rules to determine whether they are within the promulgating agency's rule-making authority. Under § 24-4-103 (8)(c)(I), C.R.S., the rules discussed in this memorandum will expire on May 15, 2019, unless the General Assembly acts by bill to postpone such expiration.

with the statute, we recommend that Rule 6-1 (G) of the rules of the Director concerning explosives regulations not be extended.

Section 24-4-104 (4) and (6), C.R.S., does not allow a summary revocation of a permit, and requires a hearing to be held for all revocations and suspensions. But the Director's Rules 3-4 (A), 3-4 (B), and 3-4 (D) allow summary revocation of a permit and require a permittee to request a hearing to obtain a hearing for both a suspension and a revocation. **Because the rules conflict with the statute, we recommend that Rules 3-4 (A), 3-4 (B), and 3-4 (D) of the rules of the Director concerning explosives regulations not be extended.**

Analysis

- 1. A rule that attempts to incorporate a code by reference but that does not state where copies are available from the organization that originally issued the code conflicts with the statute.**

The statute, section 24-4-103 (12.5)(a)(IV), C.R.S., allows for incorporation by reference of codes, but only if the rule states "where copies are available from the agency . . . originally issuing the code . . .":

24-4-103. Rule-making - procedure - definitions - statutory citation correction. (12.5) (a) **A rule may incorporate by reference all or any part of a code**, standard, guideline, or rule that has been adopted by an agency of the United States, this state, or another state, or adopted or published by a nationally recognized organization or association, **if:**

(IV) **The rule states** where copies of the code, standard, guideline, or rule are available for a reasonable charge from the agency adopting the rule and **where copies are available from the** agency of the United States, this state, another state, or the **organization** or association **originally issuing the code**, standard, guideline, or rule; and **(Emphases added)**

Rule 1-5 concerns incorporation by reference generally. The rule complies with many of the incorporation by reference requirements, but does not include the statement required by the statute:

Section 1-5 Definitions

The following publications and codes are hereby incorporated by this reference:

. . . .

These rules incorporate the editions and revisions specified. Subsequent editions and revisions have not been incorporated by this reference. The publications in-

incorporated by this reference may be examined and a copy of them may be obtained upon request and payment of the cost of reproduction during regular business hours from the Colorado Department of Labor and Employment, Division of Oil and Public Safety, 633 17th Street, Suite 500, Denver, CO 80202, and may also be inspected at the state depository libraries.

Because Rule 1-5 does not state where copies of the codes incorporated are available from the agencies that originally issued the codes, it conflicts with the statute and should not be extended.

2. Local rules cannot be incorporated by reference, and a rule that attempts to incorporate a federal law must comply with all incorporation by reference requirements.

The statute, section 24-4-103 (12.5)(a), C.R.S., allows for incorporation by reference of federal laws, but only if the reference to the incorporated material meets all of the requirements of the statute. And the incorporation by reference statute does not allow for the incorporation by reference of local rules:

24-4-103. Rule-making - procedure - definitions - statutory citation correction. (12.5) (a) **A rule may incorporate by reference all or any part of a code, standard, guideline, or rule that has been adopted by an agency of the United States, this state, or another state, or adopted or published by a nationally recognized organization or association, if:**

(II) **The reference fully identifies the incorporated code, standard, guideline, or rule by citation and date, identifies the address of the agency where the code, standard, guideline, or rule is available for public inspection, and states that the rule does not include any later amendments or editions of the code, standard, guideline, or rule; (Emphases added)**

Rule 6-1 (G) states that the most restrictive of federal, state, and local rules apply to blasting operations:

Section 6-1 General Requirements

(G) Whenever blasting operations are subject to federal, state and local rules, the higher standard shall apply.

Rule 6-1 (G) thus makes federal and local laws regarding blasting operations applicable as a matter of state law by incorporating them into these rules. But local rules cannot be incorporated by reference at all. And neither Rule 6-1 (G) nor Rule 1-5 fully identify the particular federal rules that apply to blasting operations, state that the Director's rules do not include later amendments, or state where copies are available either from the Director or the applicable federal agency.

Because Rule 6-1 (G) attempts to incorporate a local rule by reference and because it does not comply with any of the incorporation by reference requirements, it conflicts with the statute and should not be extended.

3. A rule that authorizes the summary revocation of a permit and requires the permittee to request a hearing to obtain a hearing on a permit suspension or revocation conflicts with the statute.

The statute, section 24-4-102 (7), C.R.S., defines a license to include "any agency permit." Another section of statute, section 24-4-104, C.R.S., allows a summary **suspension**—that is, a temporary suspension before holding a hearing—of a license where the agency finds that there has been a deliberate and willful violation or that emergency action is necessary. But it does not allow a summary **revocation**—which is a permanent action—of a license:

24-4-104. Licenses - issuance, suspension or revocation, renewal.

(4) (a) **Where** the agency has objective and reasonable grounds to believe and finds, upon a full investigation, that **the licensee has been guilty of deliberate and willful violation or that the public health, safety, or welfare imperatively requires emergency action** and incorporates the findings in its order, **it may summarily suspend the license pending proceedings** for suspension or revocation which shall be promptly instituted and determined. For purposes of this subsection (4), "full investigation" means a reasonable ascertainment of the underlying facts on which the agency action is based.

(6) **Except as provided in subsection (4) of this section, an agency shall not revoke, suspend, annul, limit, or modify a previously issued license until after holding a hearing** as provided in section 24-4-105. (Emphases added)

So an agency must hold a hearing **before** revoking a permit, and it must eventually hold a hearing even for a suspension, regardless of whether the permittee requests one. But Rules 3-4 (A), 3-4 (B) and 3-4 (D) allow summary revocation of a permit and require that a hearing be held only if the permittee timely requests one:

Section 3-4 Procedure on Revocation, Suspension, or Denial of Explosives Permit

(A) **In any case where the Division denies, suspends, or revokes a permit**, the Division shall notify the applicant or permittee in writing. **Said notice shall state the reason for denial, suspension, or revocation and state that, upon receiving a written request, a hearing shall be scheduled.**

(B) **Upon notice of the revocation** or suspension of any permit, **the former permittee shall immediately surrender to the Division the permit** and all copies

thereof. In addition, the former permittee must surrender control of all explosive material in his/her possession to the Division or the law enforcement agency designated by the Division, or in the presence of the Division or the law enforcement agency designated by the Division surrender control of all explosive material in his/her possession to a valid Type II permittee until a final determination on the charges is made.

(D) Any person whose permit has been denied, suspended, or revoked under Section 3.3 may apply to the Division for a hearing in order to seek relief. (Emphases added)

There is a statute that specifically authorizes explosives permit revocations:

9-7-110. Revocation or suspension of permit. A violation of this article or the rules and regulations promulgated pursuant thereto, shall constitute grounds for the revocation or suspension of a permit issued under this article.

This statute does not negate the requirements in section 24-4-104 (4)(a) and (6), C.R.S., to always hold a hearing on a revocation or suspension and to hold a hearing before a revocation.

Because Rules 3-4 (A), 3-4 (B), and 3-4 (D) do not require the Division of Oil and Public Safety to always hold a hearing and to hold a hearing before revoking a permit, they conflict with the statute and should not be extended.

4. The Director's rule-making authority does not alter these recommendations.

The Director has broad general rule-making authority:

9-7-105. Duties of director of division. (1) The director of the division shall promulgate rules and regulations to implement the provisions of this article. Such rules and regulations **may include requirements not mentioned specifically in this article but which are reasonably necessary for the safety of workers, the public, and the protection of property.** The procedure for the promulgation of such rules and regulations shall be in accordance with the provisions of section 24-4-103, C.R.S. **(Emphasis added)**

Although the Director may adopt rules that include requirements not specifically mentioned in the explosives law, nothing in section 9-7-105 (1), C.R.S., allows the Director to promulgate rules that conflict with incorporation by reference or hearing requirements imposed by statute.

Recommendations

We therefore recommend that Rules 1-5, 6-1 (G), 3-4 (A), 3-4 (B), and 3-4 (D) of the rules of the Director concerning explosives regulations not be extended because they conflict with statute.